APPENDIX H – VARIANCES

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Title 30-A § 4353. Zoning adjustment

Any municipality which adopts a zoning ordinance shall establish a board of appeals subject to this section.

1. Jurisdiction; procedure. The board of appeals shall hear appeals from any action or failure to act of the official or board responsible for enforcing the zoning ordinance, unless only a direct appeal to Superior Court has been provided by municipal ordinance.

The board of appeals is governed by section 2691, except that section 2691, subsection 2, does not apply to boards existing on September 23, 1971.

2. Powers. In deciding any appeal, the board may:

A. Interpret the provisions of an ordinance called into question;

B. Approve the issuance of a special exception permit or conditional use permit in strict compliance with the ordinance except that, if the municipality has authorized the planning board, agency or office to issue these permits, an appeal from the granting or denial of such a permit may be taken directly to Superior Court if required by local ordinance; and

C. Grant a variance in strict compliance with subsection 4.

3. Parties. The board shall reasonably notify the petitioner, the planning board, agency or office and the municipal officers of any hearing. These persons shall be made parties to the action. All interested persons shall be given a reasonable opportunity to have their views expressed at any hearing.

4. Variance. Except as provided in subsections 4-A, 4-B and 4-C, the board may grant a variance only when strict application of the ordinance to the petitioner and the petitioner's property would cause undue hardship. The term "undue hardship" as used in this subsection means:

A. The land in question cannot yield a reasonable return unless a variance is granted;

B. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;

C. The granting of a variance will not alter the essential character of the locality; and

D. The hardship is not the result of action taken by the applicant or a prior owner.

Under its home rule authority, a municipality may, in a zoning ordinance, adopt additional limitations on the granting of a variance, including, but not limited to, a provision that a variance may be granted only for a use permitted in a particular zone.

4-A. Disability variance. The board may grant a variance to an owner of a dwelling for the purpose of making that dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. The board shall restrict any variance granted under this subsection solely to the installation of equipment or the construction of structures necessary for access to or egress from the dwelling by the person with the disability. The board may impose conditions on the variance, including limiting the variance to the duration of the disability or to the time that the person with the disability lives in the dwelling. For the purposes of this subsection, a disability has the same meaning as a physical or mental handicap under Title 5, section 4553 and the term "structures necessary for access to or egress from the dwelling" is defined to include railing, wall or roof systems necessary for the safety or effectiveness of the structure.

4-B. Set-back variance for single-family dwellings. A municipality may adopt an ordinance that permits the board to grant a setback variance for a single-family dwelling. An ordinance adopted under this subsection may permit a variance from a setback requirement only when strict application of the zoning ordinance to the petitioner and the petitioner's property would cause undue hardship. The term "undue hardship" as used in this subsection means:

A. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;

B. The granting of a variance will not alter the essential character of the locality;

C. The hardship is not the result of action taken by the applicant or a prior owner;

D. The granting of the variance will not substantially reduce or impair the use of abutting property; and

E. That the granting of a variance is based upon demonstrated need, not convenience, and no other feasible alternative is available.

An ordinance adopted under this subsection is strictly limited to permitting a variance from a setback requirement for a single-family dwelling that is the primary year-round residence of the petitioner. A variance under this subsection may not exceed 20% of a setback requirement and may not be granted if the variance would cause the area of the dwelling to exceed the maximum permissible lot coverage. An ordinance may allow for a variance under this subsection to exceed 20% of a set-back requirement, except for minimum setbacks from a wetland or water body required within shoreland zones by rules adopted pursuant to Title 38, chapter 3, subchapter I, article 2-B, if the petitioner has obtained the written consent of an affected abutting landowner.

4-C. Variance from dimensional standards. A municipality may adopt an ordinance that permits the board to grant a variance from the dimensional standards of a zoning ordinance when strict application of the ordinance to the petitioner and the petitioner's property would cause a practical difficulty and when the following conditions exist:

A. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood;

B. The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties;

C. The practical difficulty is not the result of action taken by the petitioner or a prior owner;

D. No other feasible alternative to a variance is available to the petitioner;

E. The granting of a variance will not unreasonably adversely affect the natural environment; and

F. The property is not located in whole or in part within shoreland areas as described in Title 38, section 435.

As used in this subsection, "dimensional standards" means and is limited to ordinance provisions relating to lot area, lot coverage, frontage and setback requirements.

As used in this subsection, "practical difficulty" means that the strict application of the ordinance to the property precludes the ability of the petitioner to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the petitioner.

Under its home rule authority, a municipality may, in an ordinance adopted pursuant to this subsection, adopt additional limitations on the granting of a variance from the dimensional standards of a zoning ordinance.

5. Variance recorded. If the board grants a variance under this section, a certificate indicating the name of the current property owner, identifying the property by reference to the last recorded deed in its chain of title and indicating the fact that a variance, including any conditions on the variance, has been granted and the date of the granting, shall be prepared in recordable form. This certificate must be recorded in the local registry of deeds within 90 days of the date of the final written approval of the variance or the variance is void. The variance is not valid until recorded as provided in this subsection. For the purpose of this subsection, the date of the final written approval shall be the date stated on the written approval.

Maine Townsman
December, 1996

ZONING VARIANCES SHOULD BE EXCEPTION, NOT THE RULE

Note: Despite this article's original publication date, it remains a valid resource on the relevant subject matter. Recent cases and statutory references are footnoted to reflect current law (8/98).

A request that zoning boards of appeals must deal with fairly regularly but which normally can't be granted legally is a landowner's request for a zoning variance. The Court in Maine has observed that when a municipality adopts a comprehensive plan outlining the future growth and development of the community and a zoning ordinance to implement that plan, the people have concluded that the restrictions are necessary for the public benefit and the ordinance should be observed. Therefore, in the Court's opinion "variances should not be easily or lightly granted and a variance should be the exception not the rule. "*Lovely v. Zoning Board of Appeals of City of Presque Isle*, 259 A.2d 666 (Me. 1969). Rather than abiding by the plan outlined in the zoning ordinance, people seeking a zoning variance are asking the board of appeals (BOA) to allow them to use their property in a way that is forbidden by the zoning ordinance. This differs from a request for a special exception which is a request to use the property for a permitted use under certain circumstances. (See M*aine Townsman*, September 1982). "It is said that a variance is designed as an escape hatch from the literal terms of the ordinance which, if strictly applied, would deny a property owner all beneficial use of his land and thus result in confiscation. " *Anderson, American Law of Zoning (2nd ed.)* p. 137. Consequently there are strict criteria that must be met before the BOA can grant a variance.

A zoning variance may only be granted if it meets all the requirements found in the state law (30 M.R.S.A. § 4963) [30 M.R.S.A. § 4963 repealed and replaced by 30-A M.R.S.A. § 4353] plus any other variance standards contained in the local zoning ordinance. The state law prohibits the granting of a variance unless the property owner can convince the board that not granting the variance would cause an "undue hardship." Undue hardship, in this context, means a problem created by some feature of the land rather than a personal problem of the applicant, such as not having as much living or commercial space as he or she would like. This concept is illustrated in *Lippoth v. Zoning Board of Appeals of South Portland*, 311 A.2d 552 (Me. 1973). In this case the landowner applied for a setback variance to construct a garage. The hardship claimed by the land was that he had "three cars and one-half of a garage." Due to the plaintiff's health it was difficult to park and move cars, especially in the winter. The landowner claimed that the variance would permit him to build a garage where he could keep the vehicles off the street and help improve access to the two houses beyond his property via a narrow paved way. The Board denied the variance; the Superior Court permitted it. Ultimately the Supreme Court agreed with the Zoning Board of Appeals noting the claimed hardship did not meet any of the hardship criteria, including the requirement that the hardship was not due to circumstances unique to the property. "The alleged hardship," Court ruled, "arises from the ownership of three cars, a non-conforming front yard area, an unusable basement garage, and the Plaintiff's deteriorated physical condition."

In order for the BOA to determine that "undue hardship" exists, an applicant must meet all four of the following statutory criteria:

- It is impossible for the applicant's land to yield a reasonable return without the variance,
- The need for the variance is due to the unique circumstances of the property and not to the general conditions of the neighborhood
- Granting the variance will not alter the essential character of the locality, and
- The hardship is not the result of action taken by the landowner or a prior owner.

Reasonable Return

The concept of "reasonable rate of return" has been defined in very specific terms by the court. To prove that the landowners will receive no reasonable return without the variance, they must show that they will be deprived of all beneficial use of their land. What this standards means is that they must show that the land is not suitable for any use permitted by the zoning ordinance.

The Maine Supreme Court has reached the following conclusions regarding undue hardship as it relates to reasonable rate of return. The case, *Sibley v. Inhabitants of Town of Wells*, 462 A.2d 27 (Me. 1983), concerned plaintiffs who lived on a lot in their mobile home. They later bought a contiguous undersized lot for $4,200 that was subject to a deed restriction requiring that any structure erected on it be at least 26 feet wide. It would be impossible to build a 26-foot wide home and also comply with the zoning provisions. The Sibleys constructed a concrete

foundation on the lot without a building permit. After being served a notice of violation, the Sibleys sought a variance from the sideline setback and lot size requirements. The BOA treated both lots as one and granted the request for the lot size variance provided that the mobile home be removed after the new dwelling was completed. The sideline setback was denied. On appeal to the Supreme Court the plaintiffs argued that there was an "unconstitutional taking" of their property since they had paid $4,200 for the unbuildable lot which by itself was valued at $1,000. The Court said this result did not create an undue economic hardship or an unconstitutional taking since the Sibleys' land had substantial use and value in conjunction with the adjacent lot. The Court found that "administrative relief is not warranted where the owner of contiguous substandard lots can solve his own problem by combining them to meet the minimum requirements of the zoning regulations. In such a case, his development plans may have to be revised, and he may not be able to extract the maximum profit from his tract, but he has not been denied reasonable use of his land." In a similar case, *Barnard v. Yarmouth*, 313 A.2d 741 (Me. 1974), the owner of two contiguous parcels of land sought a lot size variance to build a second year round dwelling. The Court held that the minimum lot size restrictions were not unreasonable or unconstitutional. The property owner claimed a hardship since denial of the variance prevented her from building an additional home and thus increasing the desirability of the property. The Court found that the owner would still realize a reasonable economic return without the variance since she would still be able to enjoy full use and occupation of the existing house. Finally, the Court determined that even though denial of the variance prevented the property owner form increasing the property values, the property was still marketable and "reasonable return" wasn't synonymous with "maximum return." In *Curtis v. Main*, 482 A.2d 1253 (Me. 1984), the plaintiffs had bought 21 lots on an island in Kittery two years before the town enacted a zoning ordinance. Amendments enacted in 1977 affected the plaintiffs' land which became part of the Shoreland Area Protection Zone. In 1980 the plaintiffs proposed to combine twelve of their single lots into five new lots for sale as residential lots. None of the proposed lots met the minimum lot size requirements of 80,000 square feet, the largest lot having only 38,500 square feet. None of the lots met the required set back from the road or water, and only one met the required set back for sewage systems. The plaintiffs sought variances for lot size, set back, and sewage set back. Although the Board of Appeals found that the plaintiffs met two of the statutory criteria (i.e. the need for a variance is due to unique circumstances of the property and the hardship was not a result of action taken by the landowner), it denied their request because it was not convinced that the lots couldn't yield a reasonable return without the variance. The plaintiffs appealed to the Superior Court and lost and then appealed to the State Supreme Court. The Court agreed with the BOA and found that although the record contained testimony from a real estate agent regarding the value of the lots if the variances were granted, the plaintiffs "failed to prove that other beneficial uses did not exist for their property." The Court also noted that although without the variances the lots would be worthless as residential property, there was no unconstitutional taking of their property because the plaintiffs did not meet their burden of proving that there was no other use for the property except residential.

In *Leadbetter v. Ferris*, 485 A.2d 225 (Me. 1984), where the property owner wanted to expand a retail business into a wholesale business as well, the Court concluded that a variance was not justified since the evidence showed that the retail store had been successful and that it would continue to operate successfully as a retail outlet even if the variance were denied. The Court again reiterated that it is clear that "reasonable return" does not mean "maximum return."

The most recent Supreme Court case (*as of the date of this writing*) involving the issue of variances is *Marchi v. Town of Scarborough*, 511 A.2d 1071 (Me. 1986). In this case the applicant signed an agreement to purchase a corner lot located in a residential zone conditioned upon receiving a setback variance that would make the parcel a buildable lot. In a 2 to 2 decision the BOA denied the request for the variance. The board unanimously found that the plaintiffs had met two of the statutory requirements: the variance approval would not alter the essential character of the locality and the hardship was not the result of the applicant's action. However, because one of the neighbors had indicated that he would be willing to pay $3,500 for the lot if unbuildable, two of the BOA members concluded that a reasonable return was possible without granting a variance.

In its decision the Court noted that it has repeatedly recognized that reasonable return is not maximum return. It noted that the record revealed that the property was strictly confined to residential use pursuant to the zoning ordinance and it was unbuildable unless the variance was granted. Thus the Court reasoned that the record fully established the absence of any other beneficial use for the substandard lot. It referred to Driscoll, Cushing, and a Rhode Island case which noted, "a variance to permit development of a substandard parcel may not be denied solely on the ground that the applicant had an offer of purchase. A landowner has the right to develop his land; he is not required to sell it." *Anderson, supra*, p.292. The Court found that the "opportunity to sell the land did not provide the owner with a 'land use' within the zone concept" and the denial of a variance rendered the small lot unbuildable and thus deprived the owner of all beneficial use of the land.

Unique Circumstances

An undue hardship exists only if the problem is unique to the property of the applicant. A problem is not unique if it is shared by other land in the district. Because an applicant must meet each part of the four part test contained in the state statute, as well as the ordinance requirements, an applicant may fail to qualify for a variance even though his property will not yield a fair return through any use permitted by the zoning regulations if the hardship is not due to circumstances peculiar to the land.

In *Barnard* cited above, the owner of two contiguous parcels of land sought a lot size variance to build a second year round dwelling. The Court held that the minimum lot size restrictions were not unreasonable or unconstitutional and that a need for a variance wasn't created due to any unique circumstances of the property. The Court noted that the only "uniqueness" attaching to the appellant's property was its large size in relation to other parcels in the immediate area. The Court did note that a good portion of the lot fronted on the ocean and it was undeniable that the property occupied a most desirable location, but concluded that denial of the variance did not deny the applicant the normal use of the land and the very purpose of the challenged ordinance restriction was to prevent what the landowner proposed – the partitioning of an existing lot in order to accommodate another building. The Court determined that circumstances did not render the entire parcel unmarketable or unable to yield a reasonable return and the applicant was "not entitled to be given every conceivable opportunity to maximize her return or potential return in derogation of a duly enacted legitimate zoning ordinance."

Similarly in *Sibley* cited above, the court ruled that "the mere fact that the lot was substandard was not a unique circumstance justifying grant of a zoning variance, where all undeveloped lots in the neighborhood were of substandard size". The Sibleys had contended that because the lot was small and subject to a deed restriction requiring any structure built upon it to be of a certain size, the circumstances of the lot were unique. However, the Court found that the Sibleys did not show that the deed restriction was unique to their property and in fact many parcels in their subdivision were burdened in the same way. In other words, a claimed hardship which is not peculiar to the applicant's land but is shared by a neighborhood or an entire area will not support the granting of a variance to relieve it. Where the hardship is no greater than that suffered by nearby property owners, the appropriate remedy is to seek a change in the zoning ordinance rather than a variance.

Neighborhood Character

A variance must be denied if the proposed use would alter the essential character of a neighborhood. While the courts frequently have disapproved variances to permit nonresidential uses in residential districts on the basis that such uses would change the essential character of the neighborhoods, a variance to permit a use in a zone where it is not permitted might be proper, such as to allow an apartment in a single family district where the land is located on a busy highway and the neighborhood has been commercialized, or where the site is improved by remodeling a large old house. *Anderson*, supra., pp. 252-254. Most municipalities in Maine do not permit use variances. However, the Court has decided several cases that pertain to use variances.

In Cushing v. Smith, 457 A.2d 816 (1983) the Court found that it was reasonable for a variance to be granted to permit establishing a group home for recovering mentally ill people in a district zoned for single or two-family residences because competent evidence showed that the property would not yield a reasonable return for those limited residential uses because it was best suited to be used for multi-family residences. The Court concluded that there was competent evidence to support the finding that the granting of a variance would not alter the essential character of the locality.

Self Created Hardship

A person who purchases land with knowledge, actual or constructive, of the zoning restrictions which are in effect at the time of such purchase is said to have created whatever hardship the restrictions entail [Actual or presumed knowledge of the municipality's existing zoning requirements on the part of a person acquiring property does not automatically constitute "self-created hardship" for the purposes of the undue hardship test. It no longer means that the board must deny the variance application. It is now simply part of the evidence which the board must consider in deciding whether there is self-created hardship or undue hardship. See Twigg v. Town of Kennebunk, 662 A.2d 914 (Me. 1995)] Although the fact that the landowners knew about the restrictions at the time they purchased the property does not prevent them from possibly receiving favorable treatment from the Court, most courts say that a landowner is in a poor position to complain since the fact that they purchased the property with knowledge of the restrictions will be considered in determining whether their basic rights are infringed upon by the regulation. In Maine at least, the courts reason that there is no unnecessary hardship when the applicant created his or her own

difficulty by acquiring the land with knowledge of the use limitations: hardship which is self created is imposed by the applicant, and not by the ordinance. It is presumed that the purchase price was set with the restrictions in mind and that the applicant's loss of value due to the restriction is due to their own poor investment. For instance, in Sibley the plaintiffs claimed that they had a hardship because they purchased a nonconforming lot for $4,200 but it was worth only $1,000 because of the zoning restrictions. The Sibleys claimed that the hardship was not the result of their own action the Sibleys bought the lot they "were charged with knowledge of the zoning ordinance provisions that would create problems both because of the lot size and because of the deed restriction contained in their deed to the lot".

Variance Upheld

In Lively v. Zoning Board of Appeals, City of Presque Isle, 259 A.2d 666 (1969) the Court established that "variances should not be easily or lightly granted and a variance should be the exception and not the rule" But variances are permissible in some instances such as in *Driscoll v. Gheewalla*, 441 A2d 1023 (Me. 1982). A variance was granted by the BOA and upheld by the Court. The lot involved was undersized and located on a corner. It needed a large onsite sewage system. If the setback requirements were not varied, Gheewalla could only build on seven percent of the total lot and the structure could only be 17 by 20 feet. The BOA approved variances for street and side yard setbacks. The Court found that there was no self created hardship; that a variance wouldn't alter the essential character of the neighborhood because other houses were s close to the street as Gheewalla proposed; that there were unique circumstances because of the need for a larger onsite sewer system, the lot's small size, and its location on a corner which resulted in two road setback requirements; and that no reasonable return could result without a variance because otherwise only an unusually small (17' x 20') could be built.

In conclusion, a zoning variance can be granted only if it is specifically authorized by the ordinance and if it meets the statutory standards. It should be noted, however, that if the ordinance is silent about the types of variances which may be granted, 30 M.R.S.A. § 4963 [30 M.R.S.A.§ 4963 repealed and replaced by 30-A M.R.S.A. § 4353] authorized variances from any or all of the ordinance requirements, provided an "undue hardship" exists. If the request before the BOA is not essential because there is nothing unique about the property, or it would alter the essential character of the locality, or it is the result of the landowner's actions, or if the land can be used for one or more of the uses permitted in the zone and still yield a reasonable rate of return, not necessarily the maximum economic benefit, then the request must be denied.

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New Variance Test – By Rebecca Warren Seel, MMA Senior Staff Attorney

The Maine Legislature has enacted a new variance test for granting variances from certain dimensional requirements in a zoning ordinance (lot area, lot coverage, frontage and setback) [LD 1074, enacted as Public Law Chapter 148 and found in 30-A M.R.S.A. § 4353 (4-C)]. This new test is applicable only in municipalities which have adopted it as an amendment to their zoning ordinances after the effective date of the new law (September 20, 1997). Municipalities may not apply this new test to variance requests in the shoreland zone. The new test also may not be used to grant a variance for a use which is otherwise prohibited by a zoning ordinance. Municipalities which do not adopt this test by ordinance will continue to be governed by the existing "undue hardship" test for variances found in 30-A M.R.S.A. § 4353(4).

The focus of the new test is the "practical difficulty" of complying with zoning dimensional requirements. If adopted by the municipality, the test allows a zoning board of appeals to grant a variance from any of the types of dimensional requirements listed above if the board finds that:

> Strict application of the ordinance to the petitioner and the petitioner's property would cause practical difficulty and each of the following conditions exist:
>
> A. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood;
> B. The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties;
> C. The practical difficulty is not the result of action taken by the petitioner or a prior owner;
> D. No other feasible alternative to a variance is available to the petitioner;
> E. The granting of a variance will not unreasonably adversely affect the natural environment; and
> F. The property is not located in whole or in par within the shoreland areas as described in Title 38, Section 435.

The law defines "practical difficulty" to mean that "the strict application of the ordinance to the property precludes the ability of the petitioner to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the petitioner."

This new test apparently was enacted out of frustration with the traditional "undue hardship" test which generally governs the granting of variances and which is found in 30-A M.R.S.A. § 4353 (4). The "undue hardship" test is extremely difficult to meet when properly applied. It essentially allows a variance only where necessary to avoid an unconstitutional "taking" of a person's property. The new "practical difficulty" test does not use the words "reasonable return" the way the "undue hardship" test does. It requires a showing of "significant economic injury," a term which the statute does not define but which apparently was intended to be a less stringent requirement than a showing of "reasonable return." However, even under this new test, it may not be that easy to obtain a variance in most cases. The applicant must show that the need for the variance is the result of some limitation unique to his or her land that doesn't exist in the neighborhood generally. And, although the law speaks of a "significant economic injury" rather than "a reasonable return," the New York courts appear to be interpreting those terms as synonymous. (some of these New York cases are discussed below.)

A problem with the new "practical difficulty" test is that it uses many words which the law doesn't define. There are no Maine court cases interpreting this new law to help guide a board. Boards are left to their own devices in trying to determine the answers to the following questions: (1) What is "an undesirable change in the character of the neighborhood"? (2) What is an "unreasonably detrimental effect on the use or market value of abutting properties"? (3) What does "no other feasible alternative" mean? (4) What is a "significant economic injury to the petitioner"? Since the new "practical difficulty" test is similar in several respects to the test for area variances used in the State of New York, boards can get some guidance from New York court decisions. However, as with Maine cases interpreting the "undue hardship" test, "practical difficulty" is determined case-by-case by a court, based on the facts presented. There is no single rule to guide the board as to the correct way to interpret the law. The following is a summary of the holdings in some of the New York cases involving area variances:

"…(I)n determining whether significant economic injury would result, the inquiry should properly focus upon the value of the parcel as presently zoned, rather than upon the value that the parcel would have if the variance were granted. The petitioner is required to show that its property will not yield a reasonable return if the area standard restrictions are imposed…Proof that property could be used more profitably if a variance were granted is insufficient to warrant granting an application…"*Soundside Estates, Inc.v. Board of Zoning Appeals of City of Glen Clove*, 589 N.Y.S.2d 585, 586 (A.D.2 Dept. 1992).

"…(S)imply because the alternatives suggested by the Zoning Board of Appeals would be more expensive than the erection of a ten-foot fence does not mandate the granting of the variance. While financial hardship is a factor to be considered, proof that the desired improvement could more easily and cheaply be constructed if the variance were granted does not change the nature of the improvement from one that is merely desirable to one that is necessary for the practical utilization of the property." *Katz v. Town of Bedford Zoning Board of Appeals*, 609 N.Y.S.2d 24, 25 (A.S. 2 Dept. 1994).

"(Petitioner) established that expansion of the retail space on either side or the front of the building was not feasible. Existing lease agreements restricted expansion on either side. Front expansion would eliminate 50 prime parking spaces and disrupt vehicular and pedestrian access…(T)he retail space, which consisted of 50% of the entire (shopping) Center, had been vacant for a year and (petitioner) had been unable to find interested parties to rent this large space, except for Hannaford (which needed a rear setback variance to expand the building to meet its minimum needs for a grocery store). Because an anchor store was needed to draw shoppers to the Center, the continued vacancy would create an economic hardship. The practical utilization of the retail space was as an anchor store, especially inasmuch as the Center is located in a B-2 commercial zoning district whose purpose is to 'accommodate the needs of a larger consumer population." *Gersten v. Cullen*, 610 N.Y.S. 2d 675, 677 (A.D. 3 Dept. 1994).

"The petitioner did not establish the existence of any 'unique conditions' peculiar to and inherent to the property as compared to the other lots in the neighborhood such that strict compliance with the zoning law would have caused 'practical difficulties', " *Morano v. Bennett*, 581 N.Y.S.2d 424,425 (A.D. 2 Dept. 1992).

"Petitioner's only proof on the issue of financial hardship was that, if the variance was to be granted, the property would be worth $58,500 for building purposes. However, in the absence of any evidence of the price which the petitioner paid for the parcel when he initially purchased it in 1985, or of its value without the request variance, no factual predicate exists which would support a finding that denial of the variance would cause him significant economic injury. "*Durler v. Accettela*, 560 N.Y.S.2d 343, 344 (A.D. 2 Dept. 1990).

"…(T)he alternatives to an area variance appear to be impractical. Redrawing the boundary line between the Irving Avenue property and the contiguous Elmont Avenue property would cause the Elmont Avenue property to be in violation of the village's minimum front-yard setback required by the zoning ordinance. Moreover, according to petitioner, it has been unable to purchase additional property which would bring it into compliance with the village's minimum rear-yard setback requirement. And, the only other alternative is to raze the mansion. For all practical purposes, the petitioner will not be able to put the property to its intended use without being in conflict with the village's zoning ordinance." *Human Development Services of Port Chester, Inc. v Zoning Board of Appeals of Village of Port Chester*, 493 N.Y.S.2d 481, 488 (A.D. 2 Dept. 1985).

Given the many uncertainties of statutory language in the "practical difficulty" test, it is our advice that when a municipality is thinking about adopting this new statutory test by ordinance, it should decide how it wants to define the vague terms used in the statute and draft appropriate definitions to adopt as part of the new ordinance. For example, "an undesirable change in the character of the neighborhood" could be defined to mean that the variance could not cause the structure to be larger or closer to the road or property lines than the majority of structures within x feet or would not result in a percentage of lot coverage which was greater than the majority of the lots within x feet. As another example, "unreasonable detrimental effect on the use or market value of abutting properties" could be defined by whether a variance for the subject property would have the effect of blocking an established view, prosing a fire safety hazard, casting a shadow onto a certain percentage of the adjoining lot or of reducing the appraised value of the adjoining property by a certain percentage. "No other feasible alternative" could be defined to mean that there is no other place on the lot or no other location on the structure that the proposed construction could go without the need for a variance or without causing the owner to create other compliance problems on the

lot because of the zoning ordinance, deed restrictions or conditions imposed by a lease or contract. "Significant economic injury to the petitioner" could be defined as putting the owner in a position of having to purchase other property in order to have a structure or accessory structures of the size and type that the applicant had wanted to have by obtaining a variance or placing the applicant at a competitive disadvantage in the neighborhood by applying ordinance standards which would prevent the applicant from having a structure or accessory structures comparable in size, location and number to those of other lot owners within x feet.

Before rushing to adopt the new variance test, a municipality should ask itself what it is trying to achieve by adopting the dimensional requirements which a person might seek to have reduced by a variance. If the end result of the new variance test will be that anyone making a request will be granted the desired reduction, then perhaps the municipality should simply eliminate or reduce the dimensional requirements across the board or in certain neighborhoods. At least in that way the reduction can be done as part of an overall planning strategy and process rather than piecemeal through the granting of individual variances.

In summary, as noted earlier, this new law creates an additional test for the granting of a zoning variance. It applies only in municipalities which adopt it by ordinance and only in non-shoreland zoning areas. It does not replace the standard "undue hardship" test for granting a zoning variance in those municipalities which do not adopt it by ordinance. It does not replace of affect the disability variance test provided in 30-A M.R.S.A. § 4353 (4-A), which applies to all municipal zoning ordinances without any action by the municipal legislative body. It does not replace the special residential setback variance test which is outlined in 30-A M.R.S.A. § 4353 (4-B), which also applies only in those municipalities which have adopted it by ordinance.

Contact MMA's Legal Services Department for more information about these other variance tests.

SAMPLE CERTIFICATE OF ZONING VARIANCE

I, _____, the duly appointed, qualified and acting Secretary of the Board of Appeals for _____County and State of Maine, hereby certify that on the ____day of _____, 20___, the following described variance was granted by said Board pursuant to the provisions of 30-A M.R.S.A. § 4353 and the _____ Zoning Ordinance.

1. Property Owner

2. Property: _____ County Registry Book _____, Page _____.

3. Variance and Conditions:.

IN WITNESS WHEREOF, I have hereto set my hand seal this _____ day of _____, 20___.

_____
Secretary

(Printed or Typed Name)

STATE OF MAINE

_____, ss. _____, 20___.

Then personally appeared the above-names _____and acknowledged the above certificate to be his/her free act and deed in his/her said capacity.

_____

_____

(Printed or Typed Name)

Notary Public

This certificate must be recorded in the _____Registry of Deeds within 90 days of the date of final written approval of the variance or the variance is invalid (30-A M.R.S.A. § 4353).

Setback Variances for Single Family Dwellings
(from Maine Townsman, June 1992)
By Rebecca Warren Seel, MMA Senior Staff Attorney

Please note: Despite this article's original publication date, it remains a valid resource on the relevant subject matter. Recent cases and statutory references are footnoted to reflect current law. (8/98)

During its 1992 session, the Maine Legislature enacted an amendment to the law governing the granting of zoning variances in 30-A M.R.S.A. § 4353 | In 1997 the Legislature amended 30-A M.R.S.A.§ 4353 to include Sub-§ 4-C authorizing variances for a new category – "Dimensional Standards." See sections II and IV of Information Packet cover pages for further information.| Effective June 30, 1992, the new section § 4353 (4-B), authorizes municipalities to adopt an ordinance which permits the board of appeals to grant setback variances for single family dwellings where the board finds that strict application of the zoning ordinance would cause "undue hardship" as defined in the new statute. Section 4353 (4-B) establishes a special "undue hardship" definition for this type of variance which is different from the test familiar to most appeals boards. For the purposes of granting a dwelling setback when authorized to do so by a local ordinance, the "undue hardship" test is as follows:

A. The need for a variance is dues to the unique circumstances of the property and not to the general conditions in the neighborhood;
B. The granting of a variance will not alter the essential character of the locality;
C. The hardship is not the result of action taken by the applicant or a prior owner;
D. The granting of the variances will not substantially reduce or impair the use of abutting property; and
E. The granting of a variance is based upon demonstrated need, not convenience, and no other feasible alternative is available.

Standards A, B and C of this test are the same as three of the standards in the traditional "undue hardship" test set out in 30-A M.R.S.A. § 4353 (4). However, instead of requiring an applicant to show that he cannot realize a reasonable return on his investment in property without the variance, the test for a single family resident with setback requires evidence that the use of abutting property will not be substantially reduced or impaired and that there is a demonstrated need for the variance and no other feasible alternative exists.

Several additional limits on the granting of these new setback variances are included in the statute:

(1) the dwelling for which the variance is sought must be the primary year round residence of the applicants
(2) the variance may not exceed 20% of a required setback | A 1993 amendment to Section 4353(4-B) permits a municipality to specify in the ordinance that the setback may be reduced by more than 20% (except for wetland or water setbacks in a shoreland zone) where the applicant for the variance has obtained the written consent of the affected abutting landowner|; and
(3) the variance may not cause the area of the dwelling to exceed the maximum permissible lot coverage.

It should be emphasized that the board of appeals is not automatically empowered to grant these new setback variances once the law becomes effective on June 30. The town or city legislative body must adopt an ordinance which incorporates the provisions of the new statute in order for such a variance to be available. Even if the municipality adopts such an ordinance, not everyone who applies will be legally entitled to receive a setback variance. For example, if a setback variance is sought for a new residence or an addition to an existing residence in a neighborhood where all the lots are too small to enable a dwelling to conform to setback requirements, or where most of the lots have a steep slope or ledge outcropping which makes setback compliance impossible, the board would not be able to find that a variance request was due to the unique circumstances of the applicant's property.

Municipalities should not rush to adopt this setback authority for the board of appeals without careful thought. Since some of the statutory standards are vague and since this "undue hardship" test differs from the existing test with which most boards are familiar, the board of appeals will need to be educated on how to interpret the new law. Moreover, this new variance authority may appear to be a panacea to appeals boards which are sympathetic to landowners with setback problems, thus there exists a potential for much abuse if municipalities are not careful.

Variances

1. Generally most zoning variance requests will not meet all four statutory standards (30- A.M.R.S.A. § 4353) as well as local ordinance standards; courts have noted that variances should be granted sparingly.

2. Only variances specifically authorized by the ordinance may be granted. Requests must be reviewed in light of the applicable standards.

3. The statutory standards only govern variances covered by a zoning ordinance; for non-zoning variances, only the standards in the relevant ordinance will apply.

4. If frequent requests for the same type of variance are made for lots of uses in the same neighborhood, that may be a sign that the ordinance needs to be amended to avoid the need for a variance in those cases.

5. "Undue Hardship" relates to a problem created by some feature of the land, not a personal problem of the applicant.

6. Statutory standards -

   A. Reasonable economic return – see summary sheet based on Anderson treatise.

   B. Some Maine Court cases:

      (1) Barnard v. Yarmouth, 313 A.2d 741 (1974) - - One seasonal dwelling already located on a 40,000 square foot lot. Lot size required is 30,000 square feet per building

      Owner applied for lot size variance to enable construction of second, year-round dwelling. Variance denied and court upheld denial.

      Court noted that the area was comprised of 35-40 house lots, mostly less than 20,000 square feet, and mostly used for year-round homes (winterized summer cottages). Remainder of the land in the zone is undeveloped or conforming lots. Court found that granting variance wasn't due to the general conditions of the neighborhood or to unique circumstances of the property. Court also found that the owner could still realize a reasonable economic return without the variance because would still have a legal right to enjoy full occupation and use of the existing house. Also noted that the only uniqueness of the lot is that it is larger than most in the neighborhood and that to allow its division would violate the intent of the lot size provision. Even though denial of variance prevented owner from increasing property value, court noted that property was not rendered unmarketable and that "reasonable return" isn't synonymous with "maximum return".

      (2) Thornton v. Lothridge (Brunswick CEO), 447 A.2d 473 (1982) – Variances granted for number of stories and parking spaces to allow expansion of nursing home. Existing nursing home had 2-1/2 stories, 47 beds, and 12 parking spaces. Wanted expansion to 3-1/2 stories in part of building and a total of 50 beds and 24 parking spaces. Zoning ordinance only allowed maximum of 2-1/2 stories and required 39 parking spaces.

      Court upheld the variances based on evidence in the record of the need for a slightly larger nursing facility and the prohibitive cost of acquiring additional land for the required off-street parking. Court noted also that the proposed building complies with height requirements of the ordinance.
      [Note: The decision in this case is baffling in light of earlier variance decisions and the statutory standards governing "undue hardship".]

      (3) Leadbetter v. Ferris (and City of Waterville), 485 A.2d 225 (1984) – Variance for setback granted by BOA for a loading dock. Court overruled it.

Ferris rents building to Nissen's Bakery. Used a retail outlet store and then decided to expand building by adding an enclosed loading dock to have both retail and wholesale operations. Area is zoned for commercial uses. Side setback required is 50 feet. Proposed loading dock would reduce existing setback on one side from 27 feet to nine feet. Retail business already involved deliveries to the store by one trailer truck five nights a week at 3:00am. With wholesale business, possible to the store and three or four route trucks making deliveries from the store. BOA approved variance to allow nine-foot setback on conditions relating to aesthetics and noise.

Court found insufficient evidence in record to show that Ferris couldn't realize a reasonable economic return without a variance or that complying with the ordinance would result in practical loss of substantial beneficial use of the land. Letter from an appraiser regarding previous uses of the lot which failed was inconclusive. Court noted that Nissen's retail operation was successful and there was no evidence to show that it would cease if no variance were granted. Also, no evidence that a reasonable economic return from sale of the lot could be realized without a variance.

(4) Curtis v Main (Kittery CEO), 482 A.2d 1253 (1984) – Request for variance for lot size, setback, and sewage setback denied by BOA. Court upheld denial by BOA.

The twenty-one lots in question are on an island and were part of an old subdivision plan. Curtis wanted to combine 12 of them into five new lots (A-E), each lying between a road and a creek. Lots A and B are contiguous and E is contiguous with the land on which Curtis has a summer house. Minimum lot size in this zone is 80,000 square feet. All of the proposed lots are 38,500 square feet or less. None of the lots can meet the required setback from a road or a water body for buildings. Only lot C can meet the required setback for sewage systems. BOA found that Curtis met the "unique circumstances" and "self-created hardship" standards but not the standards pertaining to reasonable return and essential character of the locality. Court found that

BOA's decision was not arbitrary or capricious.

Court noted that record contained evidence of value of the five lots with variances but not their value for other than residential use. Also noted that without setback variances, the lots would be worthless because of their location between road and water, but that Curtis did not prove that there were no other beneficial uses for the lots – failed to prove the absence of nonresidential beneficial uses.

(5) Sibley v. Wells, 462 A.2d 27 (1983) – Variances for lot size and setback denied by BOA. Court upheld BOA.

Sibley owns two contiguous lots, each with 50-foot frontage on road and 100 feet deep. Purchased one (#30) in 1973 and lived on it in a mobile home since 1974. Purchased second (#29) in 1977 for $4,200. Lot #29 was 5,000 square feet. Town minimum lot size of 20,000 square feet was adopted in 1976. Lot #29 has a deed restriction requiring structures on it to be at least 26 feet wide. Ordinance also requires a 15-foot side setback. Not possible to build on that lot and comply with ordinance lot size and setback. Without a permit, built a foundation on Lot #29, which was 11 feet from one line and four feet from the other. Sibley and BOA treated lots as merged. Granted lot size variance on condition that the mobile home be removed after new dwelling completed. Denied sideline variance, so foundation would have to be moved. Second variance requests submitted 18 months later for just variances for Lot #29 to allow a 20 x 36 foot house on foundation. BOA denied because Sibley wouldn't merge the lots.

Court noted that all the undeveloped lots in the neighborhood were substandard, so nothing unique. Sibley failed to show that the deed restriction was unique to his property. Also because he owned the adjoining lot, merger would allow compliance with setback without a

variance – could solve own problem without administrative relief, even though won't realize maximum profit from the lots. Court also noted that they created own hardship because they bought Lot #29 knowing that the town's ordinance would restrict its use and then built a foundation illegally.

(6) Driscoll v. Gheewalla (Saco ordinance), 441 A2d. 1023 (1982) – Variances granted by BOA for setback. Court upheld. Lot involved is undersized and located on a corner. Needs large on-site sewage system. If setback requirements not varied, Gheewalla could only build on 7% of total lot and structure could only be 17 x 20 feet. BOA approved variances for street setback and for sideyard setback, after Gheewalla was denied at an earlier hearing and returned on month later with a modified plan.

Court found no self-created hardship; that a variance wouldn't alter the essential character of the neighborhood because other houses in the immediate area were already as close to the street as Gheewalla proposed; that there were unique circumstances because of the need for a larger on-site sewer system, the lot's small size, and its location on a corner which resulted in tow road setback requirements; that no reasonable return could result without a variance because otherwise only a 17 x 20 home could be built.

(7) Lovely v ZBA of City of Presque Isle, 259 A.2d 666 (Me. 1969) – use variance case.

(8) Lippoth v. ZBA of City of South Portland, 311 A.2d 552 (Me. 1973) – personal hardship case.

Landowner applied for a "setback" variance for construction of garage. A neighboring landowner was granted leave to intervene as party defendant. The Zoning Board of Appeals denied the application and the landowner appealed. The Superior Court, Cumberland County, ordered that the variance be granted. The intervener appealed. The Supreme Judicial Court, Archibald, J., held automobiles from the street to permit access to neighboring lots was caused by the landowner's ownership of three cars and his deteriorated physical condition and did not meet the requirement for granting of a variance; the Board's decision, made after inspection of landowner's property and surrounding area, that construction of the garage would create traffic problems had no basis in fact.

(9) Marchi v. Town of Scarborough, 511 A.2d 1071 (Me. 1986)—Plaintiffs bought a corner lot in a residential zone for $16,000 contingent on obtaining a setback variance. Without the variance, the buildable portion of the lot would be an area 5 x 19 feet. A neighbor offered to buy the lot for $3,500 if the variance was denied. The zoning ordinance limited the lot to residential use. The board of appeals denied the variance, finding that the lot owner could realize a reasonable return without the variance by selling the lot to the neighbor. The Superior Court upheld this decision. The Supreme Court reversed and ordered the granting of the variance. The court found that since the lot could only be used for residential purposed the owner would be deprived of substantial beneficial use of the land without a variance. The fact that the property has a potential for sale to an abutter does not by itself outweigh the owner's showing that there is no beneficial use of the property without a variance.

(10) Anderson v. Swanson, 534 A.2d 1286 (Me. 1987) –

Defendant purchased a small lot and small (20' x 32') two-story house eight years after the city adopted zoning. Defendant sought a setback variance in order to build a large (24' x 36') addition onto the house. The BOA granted the variance and Plaintiff appealed. The Superior Court overturned the variance and the Maine Supreme Court upheld the Superior Court, finding that the Defendant had not shown "undue hardship." The court found that although the existing house was small, it offered adequate living space and that Defendant had not shown that a loss of all beneficial use of his property would result without the variance.

(11) Perrin v. Town of Kittery, 591 A.2d 861 (Me. 1991) (excerpt) – In 1980 the Perrins purchased Lot 7, a two-acre lot located in Bartlett Farms, an approved subdivision in the Town's Rural Residence Zone, and thereafter constructed a residence on a portion of the lot. In September 1987 the Planning Board approved the Perrins' application to divide Lot 7 into

two one-acre lots. The portion of the lot designated as 7A was the site on which the Perrins had constructed their residence, and the portion designated as 7B was unimproved. At that time the Town's zoning ordinance required that a building in a Rural Residence Zone be set back a minimum of 100 feet from any "streams, water bodies and wetlands." In October 1987 the Town amended its ordinance concerning wetlands and classified wetlands into "coastal", "inland", and "transitional", (see Ordinance, Ch. I, §111), and required that there be a minimum setback of 100 feet for coastal and inland wetlands and a 500foot setback from transitional wetlands. Ordinance CH. I, 'VI (D) (2).

In April 1989 the Perrins applied to the CEO for a building permit to construct a single family dwelling on that portion o f Lot 7 designated as 7B. In May 1989 the CEO denied the application on the ground that the site of the proposed structure was within 25 feet of a wetland. After a hearing on the Perrins' appeal, the Board concluded there were wetlands on the property and the proposed house would have to be 100 feet from these wetlands, and affirmed the denial of the building permit. The Perrins did not seek a judicial review of this decision. In August 1989 the Perrins filed an application for a variance from the wetland setback requirement. As a part of this proceeding the evidence presented to the Board on the appeal from the denial of the building permit was incorporated into the record requesting a variance. Following a public hearing at which no additional witnesses were presented on behalf of the Perrins, the Board denied the variance on the ground that the Perrins "could not meet all four criteria for hardship for a variance."

By a complaint against the Town, filed in the Superior Court pursuant to M.R.Civ.P 80B, the Perrins sought review of the decision by the Board and the CEO. By Count I of their complaint the Perrins alleged that the application for a building permit was part of a pending proceeding at the time of the enactment in October 1987 of the provision of the Ordinance relating to wetlands and therefore the provision did not apply to Lot 7B. Count II alleged that the Board had improperly denied a variance to the Perrins. Count III alleged that the wetlands issue was determined by the Planning Board at the time of its consideration of the Perrins' application to divide Lot 7 and could not be reexamined by the CEO or the Board. After a hearing, the court granted a judgment to the Town on Counts I and II and to the Perrins on Count I, and the parties appeal.

In the instant case, to satisfy the first prong of undue hardship the only evidence before the Board was that the application of the wetland setback would prevent the Perrins from building another residential structure on that portion of Lot 7 designated as 7B. The record does not address the value of Lot 7B is used for the construction of a residence or its value if used for other purposes, including its use as an unimproved lot contiguous to Lot 7A on which the Perrins had constructed their residence. See Sibley v. Inhabitants of the Town of Wells, 462 A.2d at 31; Barnard v. Zoning Bd. Of Appeals, 313 A.2d 741, 747, 749 (Me. 1974); cf. Marchi v. Town of Scarborough, 511 A.2d at 1073 (no reasonable return from unbuildable lot where applicant is not the abutting owner). The Perrins failed to prove that beneficial uses did not exist for Lot 7B other than its use for the construction of residence. On the evidence presented to it the board was not compelled to conclude that the Perrins had satisfied the first prong of the undue hardship test. Accordingly, we need not determine whether the Perrins met their burden of proof as to the remaining three prongs of that test. See 30-A M.R.S.A. § 4353 (4) (A)-(D).

(12) Waltman v. Town of Yarmouth, 592 A.2d 1079 (Me. 1991) – The Waltmans' property is located in a turn-of-the-century subdivision of Littlejohn Island. All or nearly all of the lots in this subdivision, many of which are undeveloped, are undersized for construction under the terms of Yarmouth's zoning ordinance, which was enacted in 1981. The Waltmans' bought their land in 1982.

In March 1990, the Waltmans filed a variance request with the Board for permission to construct a house on the lot. The proposed house measured 24' by 36' with two 8' by 24' porches; it required dimensional setback variances of 29 feet from the front setback requirements of 70 feet, 15 feet from the side setback requirement of 30 feet, and 63 feet from the rear setback requirement of 75 feet.

After holding a public hearing, the Board denied the variance request, on the basis that the Waltmans had failed to show that their need for a variance was due to unique circumstances of the lot and not to the general condition of the neighborhood, and that they had failed to show that their hardship was not the result of action taken by the applicant or a prior owner.

The Waltmans contend on appeal that the Board improperly determined that their hardship is not unique but is one common to the general condition of the neighborhood. They concede that the lots in the Littlejohn Island subdivision are generally of substandard size, and hence share the difficulty from which they seek relief by means of a variance. That circumstance, in itself, is insufficient to support Board's finding that the hardship is not unique to their lot; the Board properly concluded that, as the difficulty is one imposed by the zoning ordinance on the neighborhood generally, relief must come by way of legislative action – that is, amendment of the zoning ordinance by the town council – and not by variance. See, e.g. Radin v. Crowley, 516 A.2d 962, (Me. 1986) (area where majority of lots undersized); Sibley v. Inhabitants of Wells, 462 A.2d 17, 30 (Me. 1983) (all undeveloped lots in neighborhood of substandard size); Barnard v. Zoning Board of Appeals of Town of Yarmouth, 313 A.2d 741, 747, 479 (Me. 1974) (numerous nonconforming lots in neighborhood).

The Waltmans suggest their lot is "unique" because, unlike other lots in the neighborhood, it would be developable if only the Board would grant a variance. They contend that none of the other lots in the vicinity would qualify for variances to the State Plumbing Code for installation of wells or septic systems. We rejected a similar argument in Barnard, See id, 313 A.2d at 746-47. Moreover, there is no evidence in the record that owners of the other undersized undeveloped lots in the area have ever sought approval for wells or septic systems, or that they could not arrange for those services or obtain State Plumbing Code variances similar to those granted for the Waltmans'. Hardship was not due to unique circumstances of their lot, but was a hardship shared in common with the other lots in the neighborhood.

Because the Waltmans were entitled to a variance only if they established that they met all four of the criteria in the ordinance, we need not address their contention that the Board improperly found their hardship to be the result of their own actions. See Perrin, 591 A.2d at 864.

(13) Forester v. City of Westbrook, 604 A2d 31 (Me. 1992) (excerpt) – Michael Forester appeals from the City of Westbrook's grant of a zoning variance to a neighboring landowner, Royden Cote. Cote applied to the Westbrook Zoning Board of Appeals for a variance permitting him to build a two-level deck on a two-family home. Forester appealed the Board's decision to the Superior Court pursuant to Rule 80B. The Superior Court (Cumberland County, Alexander, J.) affirmed. Because Cote failed to satisfy the statutory prerequisites for the grant of a variance, the variance should not have been upheld. Consequently, we vacate the judgment.

Forester contends that the Zoning Board of Appeals did not address the first element of "undue hardship", that "the land cannot yield a reasonable return unless a variance is granted," and in any event could not have found "undue hardship" from the evidence before it. Cote's application explains that the variance would allow him to convert existing storage space into living space in a two-family home. However, the statute requires more than that the variance will increase the value of the land. Grand Beach Ass'n v. Old Orchard Beach, 516 A.2d at 554. "The fact that the variance would permit the defendant to increase his return does not, in any way, support the conclusion that the land cannot yield a reasonable rate of return unless a variance is granted." Id. At 555. Although o economic proof was required to establish undue hardship where, in the absence of a variance, the applicant's home would be limited to dimensions of 17' by 20', Driscoll, 441 A.2d at 1030, limitations on living space alone do not constitute undue hardship. In Anderson v. Swanson, 534 A.2d at 1289, we held that the defendant failed to establish deprivation of a reasonable rate of return by simply showing that without a variance his house was confined to a 20' x 32' footprint.

Only once was the issue of hardship mentioned at the Zoning Board of Appeals hearing; the Board member making the motion to approve Cote's application stated, "It is not clear to me that we've dealt with the hardship issue; (sic) however, I find the request to be a reasonable one." Since the Zoning Board of Appeals had before it no evidence that "the land cannot yield a reasonable return unless a variance is granted," its grant of the variance may not stand.

(14) Greenberg v. DiBiase, 637 A.2d 1177 (Me. 1994) – DiBiase owned two lots which were separated by a private road, both with some shore frontage. One was developed with a single-family residence. She obtained setback variances from the BOA to build a small residence and septic system on the other lot and the neighbors appealed. The court upheld the variances, finding that there was substantial evidence in the record supporting a finding of "no reasonable return." Economic proof is not necessary to support a finding of no reasonable return (citing Forrester v. Westbrook). Without a variance, the setback requirements would preclude construction of any residential structure. The court concluded that this would result in the practical loss of substantial beneficial use of the land; it didn't expressly find that the town's ordinance only allowed residential uses on this lot, but cited Marchi v. Scarborough to support its conclusion. The court distinguished this case from Sibley v. Wells, finding that the lots in this case weren't contiguous because a private road separated them, so the board correctly analyzed "reasonable return" by just considering the vacant lot standing alone.

(15) Brooks v. Cumberland Farms, Inc., 703 A.2d 844 (Me. 1997) – Cumberland Farms (prospective buyer) received setback variances to permit it to replace existing gas tanks, erect a canopy, and relocate a sign. It submitted evidence to demonstrate that the gasoline sales couldn't legally continue under State law unless the tanks were replaced. It also submitted financial information to show that the existing convenience store had been unprofitable for 4 of the last 5 years and that an apartment building on the property was uninhabitable unless a significant amount of money was spent on renovations. On this basis the BOA found "no reasonable return" without a variance. An abutter (Broods) appealed, arguing that the zoning ordinance permitted other uses which could be conducted without variances and that Cumberland hadn't shown that none of these could be conducted. The Superior Court agreed with Brooks and overturned the variances. Cumberland appealed. The Supreme Court found that the undue hardship test shouldn't be modified just because Cumberland wanted to continue an existing use. The court stressed that Cumberland had to demonstrate the practical loss of all beneficial use of the land without the variances. Cumberland failed to do this because it failed to show that it couldn't yield a reasonable return from any use allowed by the zoning ordinance or that the expense of establishing such an allowed use would be prohibitive.

Variances: Self-Created Hardship Revisited

(from *Maine Townsman*, November, 1995
By Richard Flewelling, MMA Senior Staff Attorney

A recent Maine Law Court decision significantly revises the rule of self-created hardship which the Court itself has led lower courts and boards of appeals to apply in cases involving zoning variances. In *Twigg v. Town of Kennebunk,* 662 A.2d 914 (Me. 1995), the Court ruled that while actual or constructive knowledge of zoning restrictions prior to the purchase of property may be considered in determining self-created hardship, it is not, by itself, determinative. Rather, prior knowledge, in combination with other factors, may result in self-created hardship. This is a substantial departure from earlier cases apparently holding that prior knowledge of zoning restrictions is tantamount to self-created hardship. (*See, e.g. Bishop v. Town of Eliot,* 529 A.2d 798 (Me. 1987); *Your Home, Inc. v Town of Windham,* 528 A.2d 468 (Me. 1987); *Sibley v. Town of Wells,* 462 A.2d 27 (Me. 1983)).

In articulating the new rule, the Court seemed to concede that its prior decision may have been misleading but contended that they had been misconstrued as well. The Court rejected Bishop explicitly, however, and distinguished *Sibley* and *Your Home* by noting that in both cases, in addition to their prior knowledge, the petitioners' attempted avoidance of zoning restrictions was "clear". Unfortunately, what is now not clear is whether prior knowledge of zoning restrictions has any relevance to self-created hardship absent some overt act of the property owner or an appeal utterly lacking in merit.

Nevertheless, *Twigg* reaffirms the most important principle of law governing zoning variances, namely, that the requisite "undue hardship" exists only where the property cannot yield a reasonable return from any permitted use. Noting that this is tantamount to the practical loss of all beneficial use, the Court concluded that the current use of the property in this case (for recreational boating activities) was sufficient to deny the appeal.

PERMITTED BY VARIANCE

Question: Our appeals board granted zoning variances to allow a home to be built on an undersized lot in a location which does not conform to required setbacks. The variances were never appealed and the home was constructed. Now the owner wants to construct an addition which will not encroach any further into the required setback area. Should we treat the existing building as a nonconforming structure or as a permitted structure? Are any variances needed for the addition?

Answer: Absent language in your zoning ordinance to the contrary, you should treat the house built on the basis of variances as a structure permitted by variances which run with the land rather than as a nonconforming ("grandfathered") structure. *Wescott Medial Center v. City of South Portland*, CV0940198 (Super. Ct., Cum City) (July 15, 1994). Whether a variance is needed for the expansion of the structure will depend on the wording of your ordinance. However, the original structure required setback variances. In granting those variances, the appeals board theoretically determined what minimum size structure was necessary in order for the lot owner to realize a reasonable return on his investment. Consequently, an addition to an existing structure which required the granting of setback variances in order to receive a building permit generally would need variances in its own right since the addition generally would constitute new construction which would not conform to applicable setback requirements without a variance(s). Again, you need to check the language of your town's ordinance to be sure that there is nothing to the contrary.

(By R.W.S.)

ADA/LAND USE REGULATION

Question: Our Planning Board and Board of Appeals do not understand how the American With Disabilities Act (ADA) fits into our local land use regulations. A local business recently asked to expand into a required setback so that a ramp for the disabled can be constructed. The business claims the ramp is required to comply with ADA. Our boards have also received similar requests from homeowners, who claim the town's setback requirements are "preempted" by ADA. Is this true? Are there any guidelines as to how often or under what circumstances we have to approve non-conforming construction because the construction is disability-related? Finally, if these projects must be approved, do we have to deny the project at the Planning Board level so that a variance can be granted by the Board of Appeals? It seems so awkward.

Answer: Good questions.

First, it is not clear whether or to what extent ADA preempts local land use regulations. The ADA does not expressly preempt local ordinances, and the section of ADA that deals with the responsibilities of governmental entities (Title II) is almost entirely devoted to ensuring structural access to public *buildings* and unimpeded access to municipal *programs*, two categories into which local land use regulation would not easily fall. The *ADA Handbook*, published by the Equal Opportunity Employment Commission and the U.S. Department of Justice, States that "The ADA generally does not cover private residential facilities." Furthermore, the section of ADA that places structural access requirements on the private commercial sector (Title III, governing "public accommodations") relaxes those requirements when they are not "readily achievable" provided the business is willing and able to provide some other form of "reasonable accommodation". It could be argued reasonably that when a certain type of construction is prohibited by local codes it is not "readily achievable."

On the other hand, there is one section of the regulations implementing Title II of ADA, which reads: "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate the modifications would fundamentally alter the nature of the service, program, or activity." (28 CFR, § 35.130(b)(7)) Some would argue that a municipal ordinance is nothing if not municipal "policy", and this one section of ADA regulation clearly preempts municipal ordinances wherever their implementation might have a discriminatory effect.

Let's assume, therefore, that there is an ordinance provision that has the effect of discriminating against an applicant because of that person's disability or the disabilities of people whom the applicant wishes to serve (e.g., a group home for the disabled). Your last two questions asked how your town's land use regulations, and the boards that administer it, might be able to accommodate ADA proactively.

First, you should be aware of Maine's disability variance law found at 30-A M.R.S.A. § 4353 (4-A). This law authorized a Board of Appeals to grant variances for the purpose of constructing residential accessibility structures. Until recently, the law allowed the disability variance only where access was necessary for persons living at the property. Last year, the Legislature expanded eligibility for this variance when access is necessary for people who either live at the dwelling or regularly use it.

The disability variance law contains some guidance as to the extent of non-compliant construction and the duration of non-compliance. The construction eligible for this type of variance is limited to the installation of necessary access equipment and the building of structures (including ramp, railing, wall, or roof systems) necessary for access to or egress from the property. The law also allows the Board of Appeals to place a condition on the variance that the equipment and structure must be removed from the setback area when it is no longer necessary to serve its purpose (the so-called "ripout" requirement).

It should be noted that the four "undue hardship" criteria of the more commonly requested zoning variance do not apply to the disability variance. The criteria appear to be only that: (1) the access structure is necessary to serve a disabled person living at or regularly using the property, and (2) the access structure cannot be constructed in conformance with the zoning ordinance. It should also be noted that disability variances can be granted even if the local zoning ordinance contains no language to that effect.

Maine's disability variance law goes a long way toward providing the town with the necessary flexibility to avoid ADA-based conflict. For a few reasons, however, it is not the entire solution. First, the disability variance law only authorizes variances from zoning standards, but requests for disability-based variances may arise from decisions based on building code, site plan review, and even subdivision ordinances in some circumstances. Second, you may find it awkward to process disability-related projects through the cumbersome variance mechanism. There is nothing to prevent the town from amending its entire land use regulatory package to make it "ADA-friendly"; that is, to allow the permitting of disability access structures by the CEO or Planning Board.

The easiest way to make your ordinances ADA-friendly would be to add a "notwithstanding" clause in the vicinity of the setback and lot coverage standards. If properly triggered, this "notwithstanding" clause would override those standards and authorize the permitting of disability access structures provided certain criteria were met.

The criteria should include findings: (1) that the applicant is a disabled person or that the property is to be used by persons with disabilities, as defined by ADA; (2) that the property is a place of "public accommodation", if the town wishes to relax its standards for the business community in this way (although not necessarily required by ADA); (3) that the access structure is necessary to create an accessible route; (4) that the access structure cannot be reasonably or feasibly created without infringing on the standards otherwise established in the ordinance; (5) that the design of the access structure conforms to standardized disability construction specifications (e.g., the accessibility design standards published by the American National Standards Institute (ANSI) or in the federal register pursuant to ADA (the ADA Accessibility Guidelines, or ADAAG)); and (6) that the design of the access structure minimizes encroachment on or other variation to the standards otherwise established in the ordinance. If the town wished, the ordinance could authorize the CEO or Planning Board to condition the permission with a "ripout requirement" if the need for the access structure was temporary, such as is allowed under Maine's disability variance law.

With this kind of application-specific flexibility built into your land use ordinances, along with the disability variance law as a back-up at the Board of Appeals level, you may be able to diminish the confusion or frustration that can develop between the ADA and local land use regulation

(By G.F.H.)

DEP DENIED STANDING TO APPEAL SHORELAND

A sharply divided Maine Supreme Court has denied the Department of Environmental Protection and the Attorney General standing to appeal the grant of a shoreland zoning variance where neither participated at the local board of appeals level.

In DEP v. Town of Otis, 1998, ME 214, the Attorney General filed a Rule 80B appeal on behalf of the DEP challenging the factual basis for the variance. Although the DEP had earlier submitted comments to the Planning Board and later asked the Board of Appeals to reconsider its decision, neither the DEP nor the Attorney General had appeared, personally or through filings, at the Board's hearings. This, according to the Court's majority, was fatal to the State's claim that it was a "party" to the proceeding – a prerequisite to the right of appeal. The majority also did not buy the State's argument that it had special status to appeal despite its failure to appear by virtue of its role in shoreland zoning enforcement. The Court acknowledged the State's right to protect the public interest but concluded that it would be unfair to the Town and the applicant to allow the appeal where neither had had the benefit of the State's objections during the initial proceedings.

In a strongly worded dissent, the remaining justices wrote that the majority had stood the judicial doctrine of standing on its head and barred the State from protecting the public interest. The minority went on to consider the merits of the appeal, holding that the evidence did not support the Board's findings of no reasonable return, but this of course was of little consequence; under the majority's reasoning, the Board's decision stands simply because neither the DEO nor the Attorney General challenged it at the time it was being made.

(By R.P.F)

Maine Townsman, Legal Notes
Maine Municipal Association
By Richard Flewelling, Senior Staff Attorney
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A recent Maine Supreme Court decision appears to have settled the question of whether the authority to grant zoning variances rests exclusively with board of appeals.

In Perkins v. Town of Ogunquit, 1998 ME 42, abutters appealed the Planning Board's waiver of a frontage requirement where the ordinance expressly authorized such waivers for pre-1930 buildings that met certain design review standards. (The waiver was for less than one foot, but the Board of Appeals had earlier denied a variance for lack of undue hardship.) The property owner argued that despite the statutory grant of variance authority to boards of appeals only (30-A M.R.S.A. § 4353), the law did not preempt municipalities from delegating to their planning boards the authority to waive zoning requirements under "home rule." The Law Court disagreed, however, holding that the Planning Board's "waiver" was in reality a variance and that the ordinance provision authorizing it was preempted by the exclusive statutory scheme.

Municipalities should review their zoning ordinances for these unauthorized waivers and either repeal them or reassign the authority to their boards of appeals as variances.